Harris Mohd Salleh v Ismail bin Majin, Returning Officer & Ors

HIGH COURT (KOTA KINABALU) — ELECTION PETITIONS NO K5 OF 1999 AND NO K11 OF 1999
MUHAMMAD KAMIL J
8 JUNE 2001

Election *— Petition — Allegation of unfair practice — Printing election advertisements or handbills without name and address of printer — Liability of candidate for acts of his political party members — Election Offences Act 1954 ss 11 & 32*

Election *— Petition — Allegation of corrupt and illegal practices — Validity of election rolls — Whether contains names of non-citizens and person who had been convicted for possession of fake identity cards — Elections Commission did not hold a public inquiry despite objections — Whether election rolls illegal*

There were two election petitions, Election Petition No K5/99 and Election Petition No K11/99, arising out of the Sabah State Election held on 13 March 1999. The election petitions concerned the N13 Constituency, Likas, which was won by the SAPP (BN) candidate, Datuk Yong Teck Lee ('Datuk Yong'). In Election Petition No K5/99, the petitioner alleged that during the 1999 election, the parties had used unfair practices which constituted offences under the Elections Offences Act 1954 ('the 1954 Act'), in particular the putting up of four huge billboards in the vicinity of the Likas polling station. These huge billboards, measuring 16' x 21' each, bore no printer's name and address on it as required by the law. The billboards were put up on the eve of the polling day (9 March 1999) at strategic points and these billboards contained false statements of facts, which seriously defamed the petitioner and which had directly or indirectly affected the results of the election in the Likas Constituency. The petitioner complained that Datuk Yong and/or his agents had with his knowledge or consent during the above election printed, distributed and/or posted up advertisements, handbills or posters which refers to the said election and which does not bear upon its face the names and addresses of its printer and publisher. In Election Petition No K11/99, the petitioner brought an action against the Sabah state election officer ('the first repondent'), the returning officer, Ismail bin Majin ('the second respondent') and Datuk Yong alleging that the Election Rolls 1998 which were used in the state election in March 1999 for the N13 Likas Constituency was illegal as it contained the names of non-citizens and persons who had been convicted for possession of fake identity cards, that there were corrupt practices and conspiracy.

Held:

(1) An election judge could declare an election void if the management of the election was not conducted substantially in

accordance with election law irrespective of whether the irregularities complained of had affected the election result or not (see p 445B); *Morgan v Simpson & Anor* [1974] 3 All ER 722, *Tanjong Puteri Johore State Election Petition, Re; Abdul Razak bin Ahmad v Datuk Md Yunos bin Sulaiman & Anor* [1988] 2 MLJ 111*Abd Hamed bin Mamat v Uz Baharudin bin Mohd & Ors* [1993] 1 AMR 1 followed.

(2) A candidate at an election is responsible for the acts of his agents who are not and would not necessarily be agents under the common law of agency (see p 446E); *Ali Amberan v Tunku Abdullah* [1970] 2 MLJ 15 followed. Datuk Yong had failed to put up evidence in rebuttal to the petitioner's case, and the court found that the petitioner's case had been proven on a balance of probabilities (see p 446H); *Hamad bin Mat Noor v Tengku Sri Paduka Raja & Ors* [1993] 3 MLJ 533 followed. On the evidence as a whole, the court found that Datuk Yong had committed an offence under s 11(c) and (d) and s 32 of the 1954 Act. The court would declare the election of N13 Likas Constituency null and void (see p 447A).

(3) According to the Election (Registration of Electors) Regulations Sabah 1971, if any voter files an official objection against the inclusion of a particular person, the Election Commission ('SPR') has to hold a public inquiry in which the objector as well as the person being objected to are invited. The objector will make out a prima facie case for his objection, then the SPR will require the person being objected to give proof of his residential status (see p 447G–H). It cannot be denied that the registration of voters in the Likas electoral roll was in contravention of the law. No one, including the government department or institution, is above the law. It is common knowledge that an influx of illegal immigrants has plagued Sabah for some years. It is a well known fact as it had appeared in the local dailies too frequently. The SPR ought to be aware of it and when the objections were raised as in this case, the SPR ought to have held a public inquiry as prescribed by the election laws. The exposure of fraudulent practices such as massive registration of phantom voters is time consuming. However, it has to be done to defend and preserve the meaningful practice of democracy in Malaysia. As custodians of free and fair elections, the SPR is duty bound to do it (see p 453A–C).

(4) It appears that the SPR had deliberately or knowingly sent those letters (exhs P21 and P22) that prohibited the holding of a public inquiry (except in cases of death or loss of eligibility). No one knows the reason or the rationale for doing so, this is best known only to the SPR. It is obvious that the SPR's lack of action in holding a public inquiry in the face of the objections is unacceptable. Therefore the certification in December 1998 of the electoral roll for Likas Constituency was not bona fide. The failure of SPR to maintain an electoral roll in accordance

with the law makes the electoral roll illegal. Such is the case in the 1998 electoral roll for Likas Constituency (N13). The court would in the circumstances, uphold the petitioner's petition that the 1998 electoral roll for Likas Constituency (N13) was illegal (see p 453C–E).

(5) The allegations of corrupt practices or bribery made by the petitioner in the petition were too general in nature. There was no specific charge that could be brought against the third respondent in the case. Corrupt practice is quasi criminal in nature and the petitioner has to prove beyond reasonable doubt the offence of corrupt practice. Therefore the petitioner had failed to prove beyond reasonable doubt the offence of bribery or corrupt practices (see p 455E, H–I).

(6) The court can find no evidence that there was a conspiracy between the Government and the Barisan Nasional ('BN') at the highest level. Not an iota of evidence to show the existence of an agreement between the Prime Minister or any other Minister with the Sabah BN regarding the registration of disqualified persons or non-citizens in the electoral roll (see p 456E–F).

Obiter:

(1) The court seized this opportunity to record a few observations that a worrisome trend or culture, not borne out of Malaysian culture, has evolved where public institutions or government departments do not seem to care to respond to letters or reports received from the public. Such letters or reports seemed simply ignored, invariably no response or acknowledgement or receipt whatsoever has been made. It has been said that a government is a trustee of the people, and being elected by the people, it owes a higher responsibility to the people. The government must act honestly and responsibly (see pp 456H–I, 457B).

(2) The only guide to a man is his conscience, the only shield to his memory is the rectitude and the sincerity of his action. In the court's view, it is an insult to one's intelligence to be given a directive over the phone that these petitions should be struck off without a hearing, and above all, it is with prescience conscience that the court heard these petitions. God has given the trial judge the strength and fortitude, as a lesser mortal, to act without fear or favour, for fear of a breach of oath of office and sacrifice justice, and above all to truly act as a judge and not a 'yes man' (see p 457C–D).

[Bahasa Malaysia summary

Terdapat dua petisyen pilihanraya, Petisyen Pilihanraya No K5/99 dan Petisyen Pilihanraya No K11/99, yang timbul daripada pilihanraya Negeri Sabah yang telah diadakan pada 13 Mac 1999.

Petisyen-petisyen pilihanraya tersebut berkenaan Kawasan pilihanraya N13, Likas, telah dimenangi oleh calon SAPP (BN), Datuk Yong Teck Lee ('Datuk Yong'). Dalam Petisyen Pilihanraya No K5/99, pempetisyen mengatakan bahawa semasa pilihanraya tahun 1999, parti-parti tersebut telah menggunakan amalan-amalan yang tidak adil yang membawa kepada kesalahan-kesalahan di bawah Akta Kesalahan Pilihanraya 1954 ('Akta 1954 tersebut'), terutamanya menaikkan empat papan kenyataan yang besar dalam kawasan pusat undian Likas. Papan kenyataan yang besar ini, berukuran 16' x 21' setiap satu, tidak tertera nama dan alamat pencetak di atasnya sebagaimana yang dihendaki oleh undang-undang. Papan-papan kenyataan tersebut telah dinaikkan pada malam sebelum hari undian (9 Mac 1999) di tempat-tempat yang strategik dan papan-papan kenyataan tersebut mengandungi kenyataan-kenyataan yang tidak benar, yang secara seriusnya menfitnah pempetisyen dan yang secara langsung atau tidak langsung menjejaskan keputusan pilihanraya di Kawasan Pilihanraya Likas. Pempetisyen mengadu bahawa Datuk Yong dan/atau ejen-ejen beliau telah dengan pengetahuan atau kebenaran beliau semasa pilihanraya di atas mencetak, mengedar dan/atau menampalkan iklan-iklan, surat-surat pemberitahuan atau poster-poster yang merujuk kepada pilihanraya tersebut dan yang tidak terterapun nama-nama dan alamat-alamat pencetak dan penerbitnya. Dalam Petisyen Pilihanraya No K11/99, pempetisyen telah memulakan satu tindakan terhadap pegawai pilihanraya negeri Sabah ('responden pertama'), pegawai penerima, Ismail bin Majin ('responden kedua') dan Datuk Yong mengatakan bahawa Daftar Nama pilihanraya 1998 yang telah digunakan dalam pilihanraya negeri pada bulan Mac 1999 untuk Kawasan Pilihanraya N13 Likas adalah tidak sah kerana ia mengandungi nama-nama yang bukan warganegara dan mereka yang telah didakwa memiliki kad pengenalan palsu, bahawa terdapat amalan rasuah dan konspirasi.

Diputuskan:

(1) Hakim pilihanraya boleh mengisytiharkan satu pilihanraya tidak sah jika pengurusan pilihanraya tersebut sebahagian besarnya tidak dikendalikan mengikut undang-undang undian tanpa mengira sama ada luar aturan-luar aturan yang diadukan telah menjejaskan keputusan piihanraya atau tidak (lihat ms 445B); *Morgan v Simpson & Anor* [1974] 3 All ER 722, *Tanjong Puteri Johore State Election Petition, Re; Abdul Razak bin Ahmad v Datuk Md Yunos bin Sulaiman & Anor* [1988] 2 MLJ 111, *Abd Hamed bin Mamat v Uz Baharudin bin Mohd & Ors* [1993] 1 AMR 1 diikut .

(2) Seorang calon dalam satu pengundian adalah bertanggungjawab terhadap tindakan-tindakan ejen-ejennya yang bukan dan tidak semestinya merupakan ejen-ejen di bawah undang-undang perantaraan *common law* (lihat ms 446E); *Ali Amberan v Tunku*

Abdullah [1970] 2 MLJ 15 diikut. Datuk Yong telah gagal untuk mengemukakan keterangan pematahan terhadap kes pempetisyen, dan mahkamah mendapati bahawa kes pempetisyen telah dibuktikan di atas imbangan kebarangkalian (lihat ms 446H); *Hamad bin Mat Noor v Tengku Sri Paduka Raja & Ors* [1993] 3 MLJ 533 diikut. Atas keterangan menyeluruh, mahkamah mendapti bahawa Datuk Yong telah melakukan kesalahan di bawah s 11(c) dan (d) dan s 32 Akta 1954 tersebut. Mahkamah mengisytiharkan pilihanraya N13 Kawasan Pilihanraya Likas batal dan tidak sah (lihat ms 447A).

(3) Menurut Peraturan-Peraturan Pilihanraya (Pendaftaran Pengundi) Sabah 1971, jika mana-mana pengundi memfailkan satu bantahan rasmi terhadap penyertaan orang tertentu, Suruhanjaya Pilihan Raya ('SPR') perlu mengadakan satu siasatan awam di mana orang yang membantah dan juga orang yang sedang dibantah dijemput. Orang yang membantah akan membentuk satu kes prima facie untuk bantahan beliau, kemudian SPR akan menghendaki orang yang sedang dibantah memberikan bukti status penepatan beliau (lihat ms 447G–H). Adalah tidak dinafikan bahawa pendaftaran pengundi-pengundi dalam daftar nama pilihanraya Likas adalah bertentangan dengan undang-undang. Tiada sesiapa, termasuklah jabatan kerajaan atau institusi, melebihi undang-undang. Adalah pengetahuan umum bahawa satu kemasukan pendatang-pendatang haram dengan banyaknya telah melanda Sabah untuk beberapa tahun. Adalah fakta yang diketahui umum kerana ia disiarkan dalam akhbar-akhbar tempatan terlalu kerap. SPR sepatutnya peka mengenainya dan apabila bantahan-bantahan ditimbulkan seperti mana dalam kes ini, SPR sepatutnya mengadakan satu siasatan awam sebagaimana yang dinyatakan dalam undang-undang pilihanraya. Pendedahan amalan-amalan pemalsuan seperti pendaftaran besar-besaran pengundi-pengundi yang tidak wujud memang mengambil masa. Namun begitu, ia perlu dilakukan jika untuk melindungi dan mengekalkan amalan demokrasi yang bermakna di Malaysia. Sebagai penjaga pilihanraya-pilihanraya yang bebas dan adil, SPR mempunyai kewajipan untuk berbuat demikian (lihat ms 453A–C).

(4) Adalah kelihatan bahawa SPR dengan sengaja dan berpengetahuan telah menghantar surat-surat tersebut (eksh P21 dan P22) yang melarang diadakan satu siasatan awam (kecuali dalam kes-kes kematian atau kehilangan kelayakan). Tiada sesiapa yang mengetahui sebab-sebab atau rasional untuk berbuat demikian, di mana SPR sahaja yang paling mengetahui. Adalah jelas bahawa kegagalan SPR untuk bertindak dalam mengadakan satu siasatan awam ketika menghadapi bantahan-bantahan tersebut tidak boleh diterima. Oleh itu perakuan dalam bulan Disember 1998 mengenai daftar nama pilihanraya untuk Kawasan Pilihanraya Likas adalah tidak bona fide. Kegagalan

SPR untuk mengekalkan satu daftar nama menurut undang-undang menjadikan daftar nama tersebut tidak sah. Sebagaimana dalam kes daftar nama tahun 1998 untuk Kawasan Pilihanraya Likas (N13). Mahkamah akan dalam keadaan ini, mengekalkan petisyen pempetisyen bahawa daftar nama tauan 1998 untuk Kawasan Pilihanraya Likas (N13) adalah tidak sah (lihat ms 453C–E).

(5) Dakwaan-dakwaan amalan rasuah atau penyogokan yang dibuat oleh pempetisyen dalam petisyen terlalu am sifatnya. Tiada pertuduhan khusus yang boleh dimulakan terhadap responden ketiga dalam kes tersebut. Amalan rasuah adalah bersifat quasi jenayah dan pempetisyen perlu membuktikan melampau keraguan munasabah kesalahan amalan rasuah. Oleh itu pempetisyen telah gagal untuk membuktikan melampaui keraguan munasabah kesalahan amalan-amalan penyogokan atau rasuah (lihat ms 455E, H–I).

(6) Mahkamah tidak dapat menemui keterangan bahawa terdapat konspirasi antara Kerajaan dan Barisan Nasional ('BN') di peringkat tertinggi. Tiada sekelumit keteranganpun untuk menunjukkan wujud satu perjanjian antara Perdana Menteri atau mana-mana Menteri lain dengan BN Sabah berhubung pendaftaran mereka yang tidak layak atau bukan warganegara dalam daftar nama tersebut (lihat ms 456E–F).

Obiter:

(1) Mahkamah mengambil peluang ini untuk merekodkan beberapa pemerhatian bahawa satu trend atau budaya yang membimbangkan, yang bukan datangnya daripada budaya Malaysia, telah berkembang di mana institusi-institusi awam atau jabatan-jabatan kerajaan seperti tidak endah untuk membalas surat-surat yang diterima daripada rakyat awam. Surat-surat atau laporan-laporan sedemikian kelihatan tidak dihiraukan begitu sahaja, selalunya tiada maklumbalas atau pengakuan atau penerimaan apa sekalipun dibuat. Telah dikatakan bahawa kerajaan adalah pemegang amanah rakyat, dan yang diundi oleh rakyat, ia mempunyai tanggungjawab yang tinggi terhadap mereka. Kerajaan perlu bertindak dengan jujur dan bertanggungjawab (lihat ms 456H–I, 457B).

(2) Satu-satunya panduan manusia adalah hati nuraninya, satu-satunya perlindungan kepada daya ingatan beliau adalah kejujuran dan keikhlasan tindakan beliau. Pada pandangan mahkamah, adalah satu penghinaan kepada kecerdasan seseorang untuk diberikan satu arahan rasmi melalui telefon bahawa petisyen-petisyen tersebut sepatutnya dibatalkan tanpa satu perbicaraan, dan lebih-lebih lagi, adalah dengan hati nurani mahkamah telah mendengar petisyen-petisyen tersebut. Tuhan telah memberikan hakim perbicaraan kekuatan dan ketabahan,

sebagai seorang manusia biasa, untuk bertindak tanpa rasa takut atau berpihak, kerana bimbang akan pelanggaran sumpah jawatan dan pengorbanan keadilan, dan lebih-lebih lagi untuk dengan ikhlas bertindak sebagai seorang hakim dan bukan 'orang yang mengiakan' (lihat ms 457C–D).]

Notes

For cases on election petition, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1521–1559.

Cases referred to

Abd Hamed bin Mamat v Uz Baharudin bin Mohd & Ors [1993] 1 AMR 1 (folld)
Ali Amberan v Tunku Abdullah [1970] 2 MLJ 15 (folld)
Davies v Thomas [1920] 2 Ch 189 (refd)
Eastern Enterprises Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)
Gurdial Singh Nijar v KS Balakrishnan [1993] 2 CLJ 75 (refd)
Hamad bin Mat Noor v Tengku Sri Paduka Raja & Ors [1993] 3 MLJ 533 (folld)
Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor [1980] 1 MLJ 145 (refd)
Marrinan v Vibart [1962] 1 All ER 869 (refd)
Morgan & Ors v Simpson & Anor [1974] 3 All ER 722 (folld)
Mursin bin Laini @ Matdin v Datuk Fred Sinidol [1983] Writ Journal of the Sabah Law Association, Vol IV (refd)
Shen Yuan Pai v Dato Wee Hood Teck & Ors [1976] 1 MLJ 16 (refd)
Sorrell v Smith & Ors [1925] AC 700 (refd)
Tanjong Puteri Johore State Election Petition, Re; Abdul Razak bin Ahmad v Datuk Md Yunos bin Sulaiman & Anor [1988] 2 MLJ 111 (folld)
Tun Datu Mustapha bin Datu Harun v Tun Datuk Hj Mohd Adnan Robert, Yang Di-Pertuan Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2) [1986] 2 MLJ 420 (refd)
Wong Sing Nang v Tiong Thai King [1996] 4 MLJ 261 (refd)

Legislation referred to

Election (Registration of Electors) Regulations (Sabah) 1971
Election Offences Act 1954 ss 11(1)(c), (d), 32(a)
Federal Constitution art 119(1)
Indian Representation of the People Act 195 s 127A
National Registration Act 1959 s 35(1)(e)

Ansari Abdullah (*Ansari & Co*) for the petitioner in Election Petition No K5 of 1999.

Abu Bakar (Attorney General's Chambers) for the first and seventh respondents in Election Petition No K5 of 1999.

Alexander Decena (*PK Lim* and *John Sikayun* with him) (*Luping & Co*) for the second respondent in Election Petition No K5 of 1999.

Yunof Maringking (*Maring & Co*) for the sixth respondent in Election Petition No K5 of 1999.

Yunof Maringking (*Maring & Co*) for the petitioner in Election Petition No K11 of 1999.

Abu Bakar (Attorney General's Chambers) for the first and second respondents in Election Petition No K11 of 1999.

Alexander Decena (*Luping & Co*) for the third respondent in Election Petition No K11 of 1999.

Muhammad Kamil J:. There are two election petitions, Election Petition No K5/99 and Election Petition No K11/99, arising out of the Sabah State Election held on 13 March 1999. The election petitions concerned the N13 Constituency, Likas, which was won by the SAPP (BN) candidate, Datuk Yong Teck Lee, ('the second respondent') in Election Petition No K5/99 and the third respondent in Election Petition No K11/99.

These election petitions were consolidated and tried together in order to save time and costs.

Election Petition No K5/99

The petitioner in this case was Datuk Mohd Harris Salleh, 69 years old, a veteran politician who was the President of the Bersekutu Party. He had been in politics for 37 years and was a former Chief Minister of Sabah in 1984. The Bersekutu Party led by the petitioner had not fared well in the last few state elections, and in this election it fared no better.

This Election Petition No K5K5/99 essentially concerns an offence under the Election Offences Act 1954 ('the Act'), ie the making and erection of the four billboards containing false statements, made by the second respondent or his agents. The court had allowed the application by the first respondent (the Returning Officer, Ismail bin Majin) and the seventh respondent (the Election Commission of Malaysia) to be struck out as parties in this petition as they were not parties to the alleged offence regarding the billboards.

The petitioner alleged that during the 1999 election, the parties had used unfair practices which constituted offences under the Act, in particular the putting up of four huge billboards in the vicinity of the Likas polling station. These huge billboards, measuring 16' x 21' each, bore no printer's name and address on it as required by the law. The billboards were put up on the eve of the polling day (9 March 1999) at strategic points: viz Simpang Jalan Sepangar, Kg Gusung (Likas), near Masjid Kg Likas and Simpang Jalan Tuaran/Jalan Telok Likas in front of Bersekutu Headquarters. These billboards contained false statements of facts, which seriously defamed the petitioner and which had directly or indirectly affected the results of the election in the Likas Constituency.

The petitioner's complaints:

(a) Paragraph 3(A)(iv)

The second respondent and/or his agents had with his knowledge or consent during the above election printed, distributed and/or posted up advertisements, handbills or posters which refers to the said election and which does not bear upon its face the names and addresses of its printer and publisher.

Particulars

An election advertisement board which was erected at the junction of Jalan Tuaran/Jalan Tetok Likas at Kota Kinabalu on the 10 March 1999 under the heading 'Sebilangan Besar Dosa-Dosa Harris Yang Tidak Boleh Dimaafkan Oleh Rakyat Sabah.

(b) Paragraph (b)

An election advertisement board which was erected at the junction of Jalan Tuaran/Jalan Telok Likas at Kota Kinabalu on 10 March 1999 under the heading 'Reject This Arrogant Politician'.

(c) Paragraph (c)

An Election advertisement board which was fixed at a workshop at Taman Nelly, Kolombang, Inanam at Kota Kinabalu on or before 10 March 1999 under the heading 'Sabah Petroleum Deal KTV'.

The false statements in the billboards were as follows:

Sebilangan Besar Dosa-Dosa Harris Yang Tidak Boleh Dimaafkan oleh Rakyat Sabah:

1	Siapa menjatuhkan Tun Mustapha/USNO?	Dia
2	Siapa serahkan hasil minyak Sabah?	Dia
3	Siapa jual Labuan?	Dia
4	Siapa mengusir orang-orang Islam di setinggan?	Dia
5	Siapa menindas pegawai-pegawai kerajaan Islam '76–85' (sembilan tahun)?	Dia
6	Siapa menipu Tun Mustapha naik ke Istana angkat sumpah?	Dia
7	Siapa yang mengetuai rusuhan 1986?	Dia
8	Dan banyak dosa-dosa lain lagi.	

The English translation of the statements are as follows:

I will deal with three main statements which are of real significance; viz,

1	Who brought down Tun Mustapha/USNO?	He
2	Who surrendered oil revenue of Sabah?	He
3	Who sold Labuan?	He

4	Who chased out Muslims at squatter areas?	He
5	Who victimized Muslim Government officers '76–85' (nine years)?	He
6	Who cheated Tun Mustapha into going up to the Istana to be sworn in?	He
7	Who led the riots in 1986?	He
8	There are many other sins.	

(1) Sabah Oil Revenue

(2) Labuan; and

(3) Riot in 1986.

Sabah oil revenue

Following the discussions held in 1974 between the Prime Minister and the Chief Ministers of Sabah and Sarawak respectively, it was agreed that Parliament passed the Petroleum Development Act 1974, wherein it was agreed that all the 13 states in Malaysia, would relinquish the right over petroleum in each state to a statutory body to be established, known as Petronas.

On 22 March 1975, via an agreement between Petronas and Sabah, Sabah will relinquish its right over petroleum found in the State of Sabah to Petronas. In other words, the right over petroleum is vested forever in Petronas. Petronas, in return for the right given by Sabah state, will pay the 10% royalty on the petroleum received from its contractors, Shell and Esso, 5% to the state of Sabah where petroleum was found and 5% to the Federal Government. Similar agreements were concluded between Petronas and each of the other 12 states.

The Sabah Government was represented by the Chief Minister (then the late Tun Fuad) and Petronas by its Chairman (Tengku Razaleigh Hamzah). Apparently, each of the 13 states (in Malaysia) relinquished the right over petroleum in its state to Petronas, even though some of the states had no petroleum, for instance, the state of Terengganu relinquished its right over petroleum via the 1975 agreement with Petronas although no petroleum was found in the state of Terengganu then.

Labuan

Labuan was never sold to the Federal Government as there was no payment received by the Sabah Government or Harris. It was agreed by the Federal Government and the Sabah Government that the administration of Labuan be given to Wilayah Persekutuan which had the resources and finance to

develop Labuan effectively, in the words of Harris, as it were it would be another 'Singapore' (perhaps a smaller Singapore).

When the Rang Undang-Undang Wilayah Persekutuan Labuan 1984 was tabled in Parliament, there was no opposition from any quarters especially Sabah. As such, Sabah had consented to the passing of the law which created the Wilayah Persekutuan Labuan, a territory in Malaysia, and the Federal Government was not involved in the administration of Wilayah Persekutuan Labuan at all. The statement in the billboard that Harris had sold Labuan to the Federal Government was absolutely absurd.

The riot in 1986

According to evidence in court, Harris had never been involved in riots of any kind in Sabah all his life. Harris had never been charged nor convicted of an offence of riot. However, on 23 March 1986 at the invitation of Tun Mustapha (the late) he participated in a peaceful demonstration for the Muslim community, and no arrest was made. This was confirmed by PW17, Datuk Hj Abdul Karim Bin Abd Ghani (the UMNO Sabah Chief), in his testimony at this hearing.

This evidence stood unchallenged.

The putting up of the huge billboards were undertaken by the workers of SAPP surreptitiously on the eve of the polling day as testified by several witnesses including PW6 and PW7. They were put up in the stealth of the night at the abovementioned places, and were hastily dismantled almost immediately after the close of polling on the following day. It was observed that these billboards bore the BN symbols, but did not carry the printer's name and address thereon. Following an investigation by PW6 and PW7 (Harris's men), they found a workshop where the billboards were printed, and on inquiry they were told that it was on the instruction and direction of SAPP officials. There is no evidence to show that the second respondent personally put up the billboards, but it was the SAPP officials or workers who put up these billboards. There was no evidence in rebuttal to this piece of evidence.

The work of SAPP members or agents in erecting these billboards may be imputed to its leader, ie the second respondent. There is no evidence to show that he had no knowledge about this. Evidently it is clear that these billboards were erected for the sole benefit of the SAPP (BN) candidate, the second respondent.

The law

Section 11 of the Act states:

> (1) Every person who:
>
> (a) …
>
> (b) …
>
> (c) prints, publishes, distributes or posts up or causes to be printed, published, distributed or posted up any advertisement, handbill,

placard or poster which refers to any election and which does not bear upon its face the names and addresses of its printer or publisher;

(d) makes or publishes, before or during an election, for the purpose, of affecting the return of any candidate, any false statement of fact in relation to the personal character or conduct of such candidate;

(e) …

(f) …

shall be guilty of a corrupt practice, and shall, on conviction by a Sessions Court, be liable, in the case referred to … and, in any other case, to imprisonment for six months and to a fine of five hundred ringgit, … .

See *Ali Amberan v Tunku Abdullah* [1970] 2 MLJ 15.

A similar provision to s 11(1)(c) of the Act, it is noted, appears in s 127A of the Indian Representation of the People Act 1951. Thus:

Restriction on the printing of pamphlets, posters etc

(1) No person shall print or publish, or cause to be printed or published, any election pamphlets or poster which does not bear on its face the names and addresses of the printer and the publisher thereof.

It should be noted that both the Acts prohibited by sub-ss (c) and (d) of s 11 are classified as 'corrupt practices'.

Learned counsel for the petitioner submitted that there was no necessity to prove that a corrupt practice or illegal practice had affected the result of the election. In other words, an election is void if corrupt practice had been proved without any need to examine whether such an act had in fact 'affected the result of the election'. Even under s 32(a) of the Act, where there is non-compliance, we do not have to prove that results were affected.

Section 32 of the Act states:

The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the election judge:

(a) that general bribery, general treating or general intimidation or other misconduct or other circumstances whether similar to those before enumerated or not have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(b) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principle laid down in such written law and that such non-compliance affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

(d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a sessions court, or by the report of an election judge; or

(e) that the candidate was at the time of his election a person disqualified for election.

In *Re Tanjong Puteri Johore State Election Petition; Abdul Razak bin Ahmad v Datuk Md Yunos bin Sulaiman & Anor* [1988] 2 MLJ 111, Wan Yahya J (as he then was) adopted the rationale enunciated in *Morgan & Ors v Simpson & Anor* [1974] 3 All ER 722 that an election judge could declare an election void if the management of the election was not conducted substantially in accordance with the election law irrespective of whether the irregularities complained of had affected the election result or not. This was followed by Ahmad Fairuz J (as he then was) in *Abd Hamed bin Mamat v Uz Baharudin bin Mohd & Ors* [1993] 1 AMR 1.

Standard of proof

Under s 32 of the Act has been laid down the grounds 'which may be proved to the satisfaction of the election judge'. This also applies to s 11 of the Act, what constitutes to the satisfaction of the court.

Wan Yahya J (as he then was) in *Tanjong Puteri*'s case states at p 113:

> It is neither wise nor practical to lay down an inflexible standard of proof to be followed in an election case when dealing with such application and for that reason the legislature has obviously left it for the election court to decide the quality of evidence required to prove a case according to the circumstances of each case.

See also *Abd Hamed bin Mamat*'s case.

In *Tun Datu Mustapha B Datu Harun v Tun Datuk Hj Mohd Adnan Robert, Yang Di-Pertuan Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420, Tan Chiaw Thong J held that where there are allegations of criminal misconduct and threatening behaviour, which amounts to a criminal offence, the party alleging must prove its case on the balance of probabilities. See *Eastern Enterprises Ltd v Ong Choo Kim* [1969] 1 MLJ 236 and *Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor* [1980] 1 MLJ 145.

In *Hamad bin Mat Noor v Tengku Sri Paduka Raja & Ors* [1993] 3 MLJ 533, Lamin J (as he then was) came out in strong terms:

(1) The alleged acts of corrupt practice within the meaning of s 32(c) of the Election Offences Act 1954 ('the Act') and none of the acts enumerated in s 32 of the Act was criminal in nature. If such alleged acts were proved, then it would be a ground to declare the election of the respondent concerned null and void but there would be no finding of guilt and no conviction.

(2) A court of an election judge was a civil court and such a conclusion was fortified by s 33(2) of the Act in that the judge's power to call witnesses and to have them sworn before him was as nearly as circumstances admit as that of a High Court judge sitting in exercise of his 'original civil jurisdiction'.

(3) In order to determine whether an act is criminal in nature, one must ask the question as to whether it entails penal consequences. The acts

> enumerated in s 32 of the Act would not be visited by some form of punishment and therefore, the standard of proof required must be that as applied in civil proceedings, that is on the balance of probabilities.

Burden of proof

It was held by Lamin J (as he then was) in *Hamad*'s case that the burden of proof lies on both sides, ie the petitioner and the respondent. In *Mursin bin Laini @ Matdin v Datuk Fred Sinidol* [1983] Writ Journal of the Sabah Law Association Vol IV p 11, Chong Siew Fai J (as he then was) cited with approval Indian cases which hold that the returned candidate is not altogether absolved from all liability to adduce evidence to disprove the case of the petitioner, for instance, to prove facts within his special knowledge.

In *Shen Yuan Pai v Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16 where the late BTH Lee J held that the omission by the defendant in not calling their agent to give evidence in support of their case should be viewed against them.

In *Sarkar On Evidence* (13th Ed), p 961 it was provided that the said principle of law applies equally in election cases. The legal maxim *lex non cogit ad impossibilia* which means 'the law does not require a man to do that which he cannot possibly perform'.

Agency in election cases

A candidate at an election is responsible for the acts of his agents who are not and would not necessarily be agents under the common law of agency. In *Ali Amberan*'s case, his Lordship Raja Azlan Shah J (as His Royal Highness then was) said at p 18:

> Inspired and guided by English and Indian election law I take the view that the rule of extended scope of agency holds good in our election law; any other view would tend to make it impossible to preserve the purity and freedom of elections. Accordingly a candidate at an election is responsible for the acts of agents who are not and would not necessarily be agents under the common law of agency. Therefore a political party and its prominent members who set up the candidate and with his consent, either expressly or by necessary implication, sponsor his cause and work actively to promote his election, may aptly be regarded the 'agents' of the candidate for election purposes.

See *Gurdial Singh Nijar v KS Balakrishnan* [1993] 2 CLJ 75.

The second respondent had failed to put up evidence in rebuttal to the petitioner's case, and I found that the petitioner's case had been proven on a balance of probabilities.

His Lordship Raja Azlan Shah J (as His Royal Highness then was) in *Ali Amberan*'s case said at p 17:

> It is of significance to note that the primary purpose of the diverse provisions of the election law which may at first-hand appear to be technical is to safeguard the purity of the election process and the courts will not in ordinary circumstances minimize their operation. It is the concern of the courts to

purge elections of all kinds of corrupt or illegal practices so as to protect the political rights of the citizens and the constituency.

On the evidence as a whole, I find that the second respondent had committed an offence under s 11(c) and (d) and s 32 of the Act. I would declare the election of N13 Likas Constituency null and void.

Election Petition No K11 of 1999

The petitioner brought this action against the Sabah state election officer ('the first respondent'), the returning officer, Ismail bin Majin ('the second respondent') and Yong Teck Lee ('the third respondent').

Basically, the petition was based on three main grounds:

(1) that the Election Rolls 1998 which were used in the state election in March 1999 for the N13 Likas Constituency was illegal as it contained the names of non-citizens and persons who had been convicted for possession of fake identity cards;

(2) that there were corrupt practices; and

(3) conspiracy.

The electoral roll

The gist of the petition is that the 1998 Electoral Roll for Likas Constituency was illegal as it was compiled contrary to the Federal Constitution ('the Constitution') and Laws of Malaysia; only citizens are eligible to vote in any Parliamentary election or State election (art 119(1) of the Constitution), and the electoral roll ought not admit non-citizens or those persons who have been convicted of the offence of possession of fake identity cards.

The electoral roll for the country is updated annually by the Election Commission ('SPR'). Voters who have died are struck off and new eligible voters are added to the list. The Election (Registration of Electors) Regulations (Sabah) 1971 ('the Regulations'), which sets out in detail the outlines for this updating process, also sets out the procedure for all other voters in the electoral roll of his or her constituency.

According to this legislation, if any voter files an official objection against the inclusion of a particular person, the SPR has to hold a public inquiry in which the objector as well as the person being objected to are invited. The objector will make out a prima facie case for his objection, then the SPR will require the person being objected to give proof of his residential status.

It is public knowledge that there has been a large number of illegal immigrants present in Sabah for quite some years, and that there are numerous cases of illegal immigrants who have been registered in the electoral roll as voters using fake identity cards or identity cards illegally obtained. This is of grave concern to the Sabahans in particular, and in general to all Malaysian citizens. As a matter of fact, the third respondent (a former chief minister) had in the past been consistent in his call to the

government to carry out investigations into these cases and had brought up this issue of illegal immigrants in the electoral roll with the SPR many times when he was a member of PBS, and later SAPP. The petitioner, a member of PBS, had carried out his research and investigation, and untiringly made known the results thereof to the government. In this trial, he attempted to produce evidence to that effect before this court.

The petitioner, Chong Eng Leong @ Ching Eng Leong (PW8), is 54 years old and a surgeon by profession, stood as a PBS candidate in this election, and lost to the third respondent.

The primary contention was that the certification of the 1998 Electoral Roll for Likas Constituency was fraudulent as there were illegal practices in the registration and preparation of the electoral roll for Likas Constituency (N13), which admitted into the electoral roll many non-citizens and persons who were clearly disqualified by virtue of the fact that they had been convicted in a court of law for possession of fake identity cards.

The electoral roll for Likas Constituency was certified by SPR in December 1998. Prior to that date, there were 4,585 objections raised in respect of List A and 246 objections in List B. List A consists of names of voters in a constituency and the review thereof was not allowed except in cases of death or loss of eligibility (or disqualification). List B consists of names of voters who had made applications for transfer of constituency, eg if a person has changed his address and resides in another constituency. A person has to be in List B before he moves into List A.

The petitioner testified that there was no hearing in respect of the 4,585 objections in List A, and as such he made an appeal against the non-hearing of the objections to SPR, Kuala Lumpur, which drew a blank.

Of the 246 objections in List B, only ten objectors were present at the inquiry held on 15 November 1998. As a result 19 names were deleted in List B; in fact one objector was not even registered with the Jabatan Pendaftaran Negara ('JPN').

There were 4,197 persons having dubious identity cards (exh P15) and the petitioner had written a letter dated 20 April 1999 to the JPN about them but there was no response. Later his counsel wrote a letter (exh P16) dated 8 September 1999 to JPN on the same subject matter and received the same treatment.

On another occasion, he received from the public 36 cases of dubious identity cards (exhs P25 (1–36)) whose names appeared in the electoral roll for Likas Constituency, and he lodged a report with the police, vide Kota Kinabalu Report No 1438/1999. It appeared that no investigation had been carried out on the report.

The petitioner's evidence found corroboration in the testimony of the Pegawai Pendaftar Likas, (Registering Officer Likas), Ewol B Muji @ Edward Ewol Muji ('PW10').

As a registering officer, he registered electors (voters) for the state election, and he received objections from voters. He testified that he received 4,585 objections to List A and 246 objections to List B. Regarding

A the objections to List A, there was no public inquiry held. The reason being that there were strict instructions by SPR that no objection to List A could be entertained except in cases of death or disqualification. The instructions were contained in SPR's letters dated 7 and 8 October 1998 (exhs P21 and P22) addressed to Pegawai Pilihanraya Negeri Sabah and all pegawai pendaftars. A letter ref SPR(S)273/(42) dated 7 October 1998 (exh P22) addressed to Pegawai Pilihanraya Negeri Sabah, which stated, inter alia:

> 2 Sukacita dimaklumkan bahawa Suruhanjaya Pilihanraya telah memutuskan bantahan terhadap Senarai 'A' 1997 tidak akan diterima melainkan atas alasan kematian atau hilang kelayakan. Ini bermakna bantahan kepada Senarai 'A' 1997 yang diterima atas alasan-alasan selain yang dinyatakan tersebut dari mana-mana pembantah ditolak oleh Pegawai Pendaftar.

The words 'hilang kelayakan', are not defined. They simply means 'loss of eligibility' or disqualification.

The Pegawai Pilihanraya Negeri Sabah in his letter ref PPN(O) 1/6(66) dated 8 October 1998 (exh P21) conveyed the decision of SPR to all Pegawai Pendaftars (Registering Officers) including PW10, as follows:

> … dimaklumkan bahawa Suruhanjaya Pilihanraya Malaysia telah memutuskan bahawa bantahan Senarai A Daftar Pemilih 1997 yang telah disahkan pada 31 Disember 1997 tidak boleh diterima kecuali atas alasan kematian atau hilang kelayakan.

As a result, the petitioner and a few others made applications to PW10 appealing against the decision not to hold a public inquiry, whereby the applications were forwarded by PW10 to SPR(HQ) Kuala Lumpur (exh P49). There was no response.

PW10 further testified that he did not verify the identity cards during the registration of voters. It was not a practice that he had to verify identity cards nor the citizenship documents of those people who wished to register in the electoral roll. In other words, PW10 just followed orders of his superiors not to hold a public inquiry to an objection except in cases of death or disqualification. Superior orders or state authority is no defence to an action otherwise illegal.

The letters (exhs P21 and P22) of SPR to Pegawai Pilihanraya Sabah did not allow public inquiry to be held regarding the 4,585 objections to List A except in cases of death and the loss of eligibility (ie disqualification). Thus a citizen in List A may lose his eligibility as a citizen, for example, in contravention of the provisions of the Constitution and yet remain a voter on the electoral roll. Are persons who have been convicted in a court of law for the offence of possession of fake identity cards, not persons who have lost their eligibility? Are non-citizens who have been registered in an electoral roll, cannot be objected to and, if proven, his name should not be deleted from the roll?

The SPR has to face the truth. The 4,585 objections in List A were cases of persons having dubious identity cards or persons who had been convicted of having fake identity cards. The people who raised the

objections were exercising their rights as citizens, and it is unthinkable that the SPR should shut off the objections in List A without a public inquiry. It is a constitutional wrong for SPR to have rejected the objections outright. More importantly, it is wrong for SPR to allow non-citizens and disqualified persons to be on the electoral roll as voters. It appears that the certification of the electoral roll for the 1998 Likas Constituency by SPR was ultra vires the Constitution and is in fact illegal.

Identity card not proof of citizenship

The identity card is not proof of citizenship. It appears that the SPR takes the identity card as proof of citizenship and a person who produces a blue identity card will be registered in the electoral roll. PW10 (Pegawai Pendaftar Likas) testified at the trial that it was the normal practice that the Pegawai Pendaftar accepts for registration on the electoral roll persons who have blue identity cards and also those with temporary identity cards, that is form JPN 1/9 and form JPN 1/11. This is been much abused. For example, Indah Mahiya bt Abdullah had lost her blue identity card and reported the loss to the police, vide Report No 2429/98. Based on the police report, she was issued with a temporary identity card, form JPN 1/9. It seemed that based on the same police report No 2429/98, seven other people were issued with form JPN 1/9 (ie temporary identity card) as follows:

1	Ambun Alaisman	Identity card No H0382459
2	Siti Rafiah bt Yusop	Identity card No H038503
3	Rahman bin Sultan	Identity card No H0481302
4	Abdul Hamid bin Hashim	Identity card No H0559359
5	Rahan bt Dohula	Identity card No H0573678
6	Massa bin Angki	Identity card No H0575852
7	Sodam bin Abdullah	Identity card No H0481204

This piece of evidence stood unchallenged.

In another election case, No K 1/99 before this court, the petitioner had notified the SPR that there were cases of the use of duplicate identity card numbers in the registration of names in an electoral roll, viz:

1	Identity card No H0867925 held by:	—	
	ROSENIAH BT GANO	—	Kudat
	NGUI CHEE PING	—	Karamunting
2	Identity card No H0870205 held by:	—	

	LUISE @ YIANA BT WARISAN	—	Kudat
	LUISE VIANA BT WARISAN	—	Inanam
3	Identity card No H0870883 held by:	—	
	SAIMAH BTE IBING	—	Kudat
	FAUZIAH BTE MAHMUD	—	Lahad Datu
4	Identity card No H0872933 held by:	—	
	ABDUL BIN MUKSIN	—	Kudat
	SAIDSARIPUDIN	—	Balung
5	Identity card No H0873447 held by:	—	
	YAKU BIN DUGANG	—	Kudat
	AJIJAH BT HASSAN	—	Pantai Manis

Obviously these are in contravention of s 35(1)(e) of the National Registration Act 1959. This evidence remains unchallenged.

The Tawau Court had convicted the following persons in 1996 for the offence of possession of fake identity cards:

KASSIM BIN ALI	Identity card No H0508335;
ANWAR	Identity card No H0512235, and
KADIR LABAK	Identity card No H0454652

But their names were not deleted and were still in the 1998 certified electoral roll for Likas Constituency. See PW14's evidence (exh P62) below. Are these not persons who had lost their eligibility, 'hilang kelayakan', within the context of SPR's letter (exh P22)? I should think so. But why has the SPR failed to hold a public inquiry and have their names deleted from the electoral roll?

How easily many of the immigrants, Filipinos and Indonesians, had obtained citizenships in this maner, ie through their applications for identity cards, was well illustrated by the testimony of Asainar bin Ibrahim @ Hassan ('PW11'), a former District Chief for Bandar Sandakan from 1982 to 1985. A system which was established before Malaysia Day 1963 where an appointment of district chief, a parallel appointment (a political appointment), vis-a-vis the district officer was appointed by the government. PW11 was a Pegawai Perbadanan Kemajuan Sabah, later Ahli Lembaga Bandar Sandakan and Ketua Daerah Sandakan in 1985.

He testified that there were two categories of applicants for the blue identity cards. Those persons under 12 years old and who have birth

certificates have no difficulty in obtaining blue identity cards. Those above 12 years old and who have no birth certificates may obtain identity cards by using form HMR 10 (JPN). This form is filled up by the parents and submitted to the district chief who supported the application and sent the form to the district officer concerned, who, based on the recommendation of the district chief, approved the application. The Jabatan Pendaftaran Negara then issued the blue identity card. When PW11 was first appointed as the district chief, he had no idea of what was going on and he recommended, without question, the 1,000 and more of such applications that he received from the Native Court and, on his recommendation, they were issued with blue identity cards. He said that 'the main factor causing loss to Berjaya Government in 1985 to PBS was because Berjaya leaders sold the rights of Sabahans to foreigners, totaling 40,000 by making them blue identity cards, thus they became citizens.' He was a Berjaya Party candidate in Sungei Sibuga Constituency in the 1986 state election but lost.

In 1998, it was alleged that he was involved in a project to process and distribute blue identity cards to illegal immigrants in Sabah, the Filipinos and the Indonesians. On 9 July 1988, he was detained under the ISA for 60 days and thereafter he was placed under restricted residence for two years. He was never charged in court to this day. He alleged that there was a conspiracy at the highest level to register illegal immigrants as voters (see below).

PW13, Mutalib Md Daud, is a former Executive Secretary for Silam UMNO Division and is still a member of UMNO. Mutalib was born in Kg Lanai, Kedah and initially held a Malaya identity card. In 1970, he migrated to Sabah under the 'Untuk Kemajuan Ba' program and settled down at a village named Kg Burong, Lahad Datu where he found that a large number of illegal immigrants from Indonesia and Philippines had settled down.

He observed that there were numerous immigrants who had obtained blue identity cards in a relatively short time, three months or three years, while it took him 23 years to change his Malayan identity card into an identity card of Sabah through the normal process. He testified that of the 43,000 new UMNO members recruited at the time, only 14,000 had genuine blue identity cards, the rest he did not know how they got their blue identity cards.

From 21 October 1996, there was an exercise to recruit UMNO members for three days which attracted 10,211 new UMNO members. They applied for identity cards, but only 180 applications for identity cards from these members were approved by Jabatan Pendaftaran Negara, and the rest were rejected.

The instances of non-citizens and phantom voters in the electoral roll as disclosed at this trial may well be the tip of the iceberg. 'Phantom', according to the *Concise Dictionary* (9th Ed), means a form without substance or reality; a ghost; a spectre, and in the context of a phantom voter, it means that the voter is a non-citizen who is in an electoral roll by

virtue of a fake identity card or identity card obtained illegally. It cannot be denied that the registration of voters in the Likas electoral roll was in contravention of the law. No one, including the government department or institution, is above the law.

It is common knowledge that an influx of illegal immigrants has plagued Sabah for some years. It is a well known fact as it had appeared in the local dailies too frequently. The SPR ought to be aware of it and when the objections were raised as in this case, the SPR ought to have held a public inquiry as prescribed by the election laws.

The exposure of fraudulent practices such as massive registration of phantom voters is time consuming. However, it has to be done if we wish to defend and preserve the meaningful practice of democracy in Malaysia. As custodians of free and fair elections, the SPR is duty bound to do it.

It appears that the SPR had deliberately or knowingly sent those letters (exhs P21 and P22) that prohibited the holding of a public inquiry (except in cases of death or loss of eligibility). No one knows the reason or the rationale for doing so, this is best known only to the SPR. It is obvious that the SPR's lack of action in holding a public inquiry in the face of the objections is unacceptable. Therefore the certification in December 1998 of the electoral roll for Likas Constituency was not bona fide.

The failure of SPR to maintain an electoral roll in accordance with the law makes the electoral roll illegal. Such is the case in the 1998 electoral roll for Likas Constituency (N13). I would in the circumstances, uphold the petitioner's petition that the 1998 electoral roll for Likas Constituency (N13) was illegal.

Phantom voters

Operation Gembeling ('Ops Gembeling')

Radin Malleh ('PW14'), a Member of Parliament and the Secretary General of PBS, holds an LLB degree from Kent University, and had served the police force for 20 years, holding the rank of DSP when he left the force in 1990 to join politics. As the Secretary General of PBS, he received a lot of information and material of public interest from members of the public, including documents of 'pengundi luar' or phantom voters.

In early March 1999, he received, via Pos Laju, a box containing lists of names and dubious identity cards numbers of 40,000 people and he had forwarded them to the police, vide report No 1061/99 dated 10 March 1999 ('exh P60'). 31,845 names were found in the 1998 electoral roll, of which 2,975 names were registered in the Likas electoral roll.

He lodged a report with the police, *Re: Pengundi luar*, three times but unfortunately no action was taken. In particular, 12 fake identity cards were sent to the police for investigation, vide report KK 1794/96 dated 18 January 1996, and ten names appeared in the 1998 electoral roll of Likas Constituency, N13.

It is quite ironic that these reports are meaningless to the police, the force in which he had been a member of and served faithfully as a senior officer for a good many years.

Three persons. Mat Tahir, Normini and Tuppa were convicted by the Tawau Court for possession of fake identity cards, and on appeal, the High Court Tawau dismissed the appeal and affirmed the convictions and sentence ('exh P62'). Their names were in the electoral roll and they voted in the election.

Between 1996 to 1998 several people were arrested under ISA for involvement in the issuing of fake identity cards: Mohd Agjan bin Ariff, Jabar Khan, Bandi Pilo and Shamsul Alang — all from Sabah UMNO; and Mohd Nasir Sunjit, Asbi bin Abdul Karim, Jamah Ariffin, Asli bin Ariffin and Kee Dzulkifli bin Kee Abdul Jalil — all were officers in JPN Sabah. They were involved in the Ops Gembeling.

This operation called Ops Gembeling whereby the JPN officers were asked to collect the names of the illegal immigrants, and with the aid of some political leaders, they were given the blue identity cards. PW14 had written to JPN in respect of these illegal immigrants who were given blue identity cards ('exh P54') and he also wrote to the Ketua Pengarah Pendaftaran Negara Malaysia on 15 December 1998 before the electoral rolls were certified by SPR on 31 December 1998. There was no response.

The target of this operation was the Malays of Bugis origin, and these people formed an association known as Persatuan Kebajikan Bugis Sabah. For example, Pirsing Siraji, 22 years old, was in possession of identity card No H0481706, and his name was found in the 1998 electoral roll (but with the identity card No H04817096) for Likas Constituency. It is noted that the Sabah identity card number has seven digits, Pirsing had identity card number with 8 digits, and he was convicted by the court on 28 September 1992.

On 15 December 1998, when PW14 wrote to the JPN for verification of the identity cards, there was no response. On 7 October 1999, Hamid bin Hassan wrote an open letter (exh P66) to the Deputy Prime Minister — there was no response.

As a Member of Parliament, PW14 raised this issue in Parliament, in a letter addressed to Setiausaha Dewan Rakyat (exh P65) and it was rejected under r 23(1)(f) of standing order as it was a secret matter which the government could not disclose.

The secretary to the SPR stated that there were no phantom voters in Sabah to which the third respondent (a former chief minister) quickly put in a statement in the press 'Stop the denial and act' (exh P67). PW14 referred to a letter ('ID14') written by the Chief Information Officer UMNO (Datuk Hj Karim bin Abd Ghani), PW17, which was sent to 31 state constituencies which included Sulaman Constituency. In Election Petition No K 7/99, PW14 filed therein an affidavit to which PW17 responded. He observed that the signature of PW17 in the affidavit and ID14 were not dissimilar. It referred to about 3,972 pengundi luar.

PW17 in his testimony stated that he did not sign the letter ('ID14') and he suggested that the signature was forged. This letter was distributed to all UMNO branches in Sabah, and in the trial of the three persons (exh P62) in Tawau High Court the judge had accepted the evidence of the accused that they were just following the directions of a superior as contained in ID14. If ID14 carried a forged signature, it is therefore a forged document. This is a serious allegation, but why is it that PW17 did not publicly disown it as soon as he knew that ID14 had been sent and received by all UMNO branches in Sabah? Why didn't PW17 or UMNO refute this at the trial in the High Court at Tawau? The three convicted persons had their evidence accepted by the court that they had been directed by UMNO Sabah to register and help these immigrants get identity cards. Why didn't PW17 come to court and deny that ID14 was signed by him? It appears that many people including all the UMNO branches in Sabah and the courts had been misled and had acted on it (ID14). But there is no evidence of this alleged forgery (ID14) and it was never reported to the police. UMNO Chief Information Officer thought it fit to ignore and allow ID14 to be made use of extensively, including in court proceedings, without taking any action or step to deny or stop it. As a matter of fact, PW17 had made no mention of ID14 at all in his affidavit in Petition No K 7/99. The veracity of PW17's evidence here is highly questionable.

Corrupt practices or bribery

The allegations of corrupt practices or bribery made by the petitioner in the petition were too general in nature. PW16 testified that days before the election day, many candidates from various political parties including the third respondent and their supporters, visited the constituency. Some brought and distributed to the people food stuff such as 25kg rice each, milk, sugar, cooking oil and flour; some were supplied building materials such as zinc roofs, planks, boards and water tanks; the more ambitious built roads, canals, boats and perahus. Some distributed money. The display of generous concern and care was a very welcome thing to the voters, although it happens at five year intervals, as a prelude to each election. It is fast becoming a Malaysian way of life, a tradition as it were, that prior to an election, contesting candidates will visit their constituency with all types of gifts or presents in their endeavour to win or influence the voters to their side. Whatever it is, there is not sufficient evidence before the court to support the allegation of corrupt practices by the BN candidates. There was no specific charge that could be brought against the third respondent in the case. Corrupt practice is quasi criminal in nature and the petitioner has to prove beyond reasonable doubt the offence of corrupt practice. In the case of *Wong Sing Nang v Tiong Thai King* [1996] 4 MLJ 261, the court held that there was no direct evidence that the voters in the constituency were in any way influenced by the gift. Therefore the petitioner had failed to prove beyond reasonable doubt the offence of bribery or corrupt practices.

Conspiracy

'The gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt act causing damage. … The tort of conspiracy, however, is complete only if the agreement is carried into effect so as to damage the plaintiff,' per Salmon J in *Marrinan v Vibart* [1962] 1 All ER 869 at p 871.

Halsbury's Laws of England (4th Ed) Vol 45 p 721 states that:

> In order to make out a case of conspiracy the plaintiff must establish:
>
> 1 an agreement between two or more persons;
>
> 2 an agreement for the purpose of injuring the plaintiff; and
>
> 3 that acts done in execution of that agreement resulted in damage to the plaintiff'

Warrington LJ in *Davies v Thomas* [1920] 2 Ch 189 said:

> That is to say, to be a conspiracy — that is an unlawful conspiracy, one which gives rise to either an indictment or aright of action — it must have an unlawful object, that is, the act which it is intended to bring about must be in itself unlawful, or, if not in itself unlawful, then it must be brought about by unlawful means.

Lord Dunedin in *Sorrell v Smith & Ors* [1925] AC 700 held that an act that is legal in itself will not be made illegal because the motive of the act maybe bad.

I can find no evidence that there was a conspiracy between the Government and the Barisan Nasional ('BN') at the highest level as suggested by Mr Maringking. Not an iota of evidence to show the existence of an agreement between the Prime Minister or any other Minister with the Sabah BN regarding the registration of disqualified persons or non-citizens in the electoral roll. The semblance of an agreement in the 'Operation Gembeling' or the 'Mahathir's Project' where blue identity cards were sold to these people at RM300 a piece, evidently had no nexus to connect these to the fake identity cards sold. It is a mere gimmick to lend legitimacy to these operations. It is incredible to say that the government is involved in a conspiracy to register phantom voters especially as no such agreement existed between the government and the BN. It is true that too many politicians and public officials have exercised power and responsibility not as a trust for public good but as an opportunity for private gains.

It has been brought to my attention that the SPR has come up with the revised 1999 electoral roll for Sabah in which more than 19,900 names have been dropped there from, presumably the names are those who have died and/or have lost their eligibility to vote as citizens.

I seize this opportunity to record a few observations that a worrisome trend or culture, not borne out of Malaysian culture, has evolved where public institutions or government departments do not seem to care to respond to letters or reports received from the public. Such letters or reports seemed simply ignored, invariably no response or acknowledgement or receipt whatsoever has been made, for example, from personal knowledge

in a few cases: where my son had applied for a temporary work permit which was refused, and I wrote an appeal to the authority concerned; and in another case, my daughter had applied for a scholarship for a one year post graduate course. In both cases there was no acknowledgement despite reminders, although earlier on, personal assurances of favourable considerations had been given. Regrettably this is the very antithesis to good governance in as much as a threat to the government's effort to foster good relationship and integration between East and West Malaysia.

It has been said that a government is a trustee of the people, and being elected by the people, it owes a higher responsibility to the people. The government must act honestly and responsibly.

The only guide to a man is his conscience, the only shield to his memory is the rectitude and the sincerity of his action. In my view, it is an insult to one's intelligence to be given a directive over the phone that these petitions should be struck off without a hearing, and above all, it is with prescience conscience that I heard these petitions. God has given me the strength and fortitude, as a lesser mortal, to act without fear or favour, for fear of a breach of oath of office and sacrifice justice, and above all to truly act as a judge and not a 'yes man'.

In conclusion, I would declare that the 1998 Electoral Roll for Likas Constituency (N13) is illegal, and that the election held in March 1999 for Likas Constituency is null and void. I will inform the SPR of this decision in due course.

In Petition No K5 of 1999, costs to the petitioner against the second respondent, and Petition No K11 of 1999, costs to the petitioner against the first and second respondents. In both cases, costs are to be taxed unless agreed.

Order accordingly.

Reported by Peter Ling